MICROSOFT CORPORATION A

v.

ACT INTEGRATED SYSTEM SDN BHD

COURT OF APPEAL, PUTRAJAYA B
ZALEHA ZAHARI JCA
HISHAMUDIN MOHD YUNUS JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-02-307-2009]
6 SEPTEMBER 2012 C

COPYRIGHT: *Infringement - Computer programmes - Reproduction and marketing of pirated copies of computer programmes - Affidavit evidence - Whether fell short of establishing respondent had infringed appellant's copyright - Whether unsigned or unattributed dubious reports relied on - Whether infringement of copyright established* D

The appellant/plaintiff ('appellant'), Microsoft Corporation ('Microsoft'), was a globally recognised and renowned company and the copyright owner of a wide range of computer related products, including, amongst others, computer programmes. The respondent/defendant ('respondent') was a company incorporated in Malaysia dealing with computers and computer accessories. Microsoft commenced this action against the respondent for infringing Microsoft's copyright by reproducing and marketing pirated copies of Microsoft's computer programmes without Microsoft's consent, licence or permission. The respondent denied that it had infringed the appellant's copyright and added that since its incorporation, it had always purchased genuine software from the appellant's authorised dealers. Before the High Court, the appellant sought an injunction to restrain the respondent from infringing its copyright and claimed for general damages. The learned judge had directed that the case be heard by way of affidavit evidence. Accordingly, the parties filed and served their respective affidavits. Subsequently, the High Court dismissed the appellant's action. Hence, this appeal. E F G H

Held (dismissing appeal with costs)
Per Linton Albert JCA (majority):

(1) The appellant had relied principally on the affidavit of one Jonathan Selvasegaram ('JS'), the appellant's corporate attorney. JS clearly did not depose to his personal knowledge of the circumstances of the alleged infringement but relied I

instead on some dubious reports which were unsigned or unattributed to any particular person. In the circumstances, JS's affidavit fell far short of establishing that the respondent had infringed the appellant's copyright (*S & F International Ltd v. Trans-Con Engineering Sdn Bhd*; refd). (para 2)

(2) Since the infringement of copyright attributed to the respondent remained unestablished, there was nothing for the respondent to rebut. The appellant's contention that the respondent's failure to produce rebuttal evidence was somehow of assistance to the appellant's case was clearly misconceived. Thus, there was no merit in the appeal herein. (para 3)

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) The learned trial judge had based his judgment solely on JS's affidavit and had ignored the affidavit evidence of the appellant's other witnesses, *ie*, the affidavit of computer technician, Izanee Ariffin, who had captured screen shots as shown in his report to substantiate Microsoft's claim of infringement of copyright against the respondent. Further, the trial judge erred when he made the finding that the private investigator, Nur Ezza, had purchased a computer without a DOS and hard disk from the respondent. The affidavit evidence by the respondent (the affidavit of one Te Peng Keat) that the computer was sold to Nur Ezza without a hard disk was incredible as it did not make sense. It is elementary that the very essence of a physical computer is the hard disk/hard drive, *ie*, where computer data is stored. If the trial judge had examined the appellant's evidence in its entirety, in all probability, he would have made a finding in favour of the appellant. (paras 21, 29, 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/plaintif ('perayu'), Microsoft Corporation ('Microsoft'), adalah sebuah syarikat yang diiktiraf dan terkenal serta pemilik hak cipta pelbagai jenis produk berkaitan komputer, termasuk, antara lain, program-program komputer. Responden/defendan ('responden') adalah sebuah syarikat yang diperbadankan di Malaysia berurusan dengan komputer dan aksesori komputer. Microsoft memulakan tindakan ini terhadap responden kerana telah melanggar hak cipta Microsoft dengan membuat salinan dan pemasaran salinan-salinan

cetak rompak program-program komputer Microsoft tanpa keizinan, lesen atau kebenaran Microsoft. Responden menafikan bahawa ia telah melanggar hak cipta perayu dan menyatakan bahawa sejak penubuhannya, ia telah sentiasa membeli perisian tulen daripada peniaga-peniaga yang dibenarkan perayu. Di hadapan Mahkamah Tinggi, perayu telah menuntut injunksi bagi menghalang responden dari melanggar hak ciptanya dan telah menuntut ganti rugi am. Yang arif hakim telah mengarahkan kes didengar melalui keterangan afidavit. Pihak-pihak seterusnya memfailkan dan menyerahkan afidavit-afidavit masing-masing. Mahkamah Tinggi telah menolak tindakan perayu. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Linton Albert HMR (majoriti):

(1) Perayu telah bergantung terutamanya pada afidavit seorang Jonathan Selvasegaram ('JS'), iaitu peguam korporat perayu. JS dengan jelasnya tidak mendeposkan pengetahuan peribadi beliau mengenai keadaan-keadaan dakwaan pelanggaran tetapi sebaliknya bergantung kepada beberapa laporan yang diragui yang tidak ditandatangani atau tidak berpunca daripada mana-mana pihak tertentu. Dalam keadaan sedemikian, afidavit JS tidak berjaya membuktikan bahawa responden telah melanggar hak cipta perayu (*S & F International Ltd v. Trans-Con Engineering Sdn Bhd;* dirujuk).

(2) Oleh kerana pelanggaran hak cipta oleh responden tidak berjaya dibuktikan, responden tidak perlu menangkis apa-apa. Hujahan perayu bahawa kegagalan responden mengemukakan keterangan bantahan telah membantu kes perayu adalah jelas tersilap. Oleh itu, tiada merit di dalam rayuan ini.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Yang arif hakim bicara telah mengasaskan penghakimannya semata-mata pada afidavit JS dan telah mengabaikan keterangan afidavit saksi-saksi perayu yang lain, seperti, afidavit juruteknik komputer, Izanee Ariffin, yang telah menangkap gambar-gambar skrin seperti yang ditunjukkan di dalam laporan untuk menyokong dakwaan pelanggaran hak cipta Microsoft terhadap responden. Seterusnya, hakim bicara khilaf apabila beliau membuat dapatan bahawa penyiasat persendirian, Nur Ezza, telah membeli sebuah komputer tanpa DOS atau cakera

keras daripada responden. Keterangan afidavit responden (afidavit seorang Te Peng Keat) bahawa komputer telah dijual kepada Nur Ezza tanpa cakera keras adalah mustahil kerana ia tidak masuk akal. Ia adalah asas bahawa intipati fizikal komputer adalah cakera keras/hard drive iaitu di mana data komputer disimpan. Jika hakim bicara telah meneliti keterangan perayu secara keseluruhan, dalam segala kebarangkalian, beliau akan membuat dapatan yang memihak kepada perayu.

Case(s) referred to:

S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***

For the appellant - Kenneth St James (Harleen Kaur with him); M/s Michael Chai & Co

For the respondent - Annou Xavier (Phang Kian Chung with him); M/s Azri, Lee Swee Seng & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D5(IP)-22-445-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert JCA:

[1] The appellant is the copyright owner of computer programmes. The respondent sells computers. The respondent sold a computer to one Nur Ezza Saad. The computer sold was allegedly installed with the appellant's software. The respondent did not obtain the consent, license or permission of the appellant for the software installed in the computer which allegedly constituted an infringement of the appellant's copyright. Hence the appellant commenced an action against the respondent seeking various reliefs including an injunction to restrain the respondent from infringing the appellant's copyright. The respondent denied that it had infringed the appellant's copyright and added that since its incorporation in 2000 it had always purchased genuine software from the appellant's authorized dealers. The trial proceeded by way of affidavit evidence.

[2] The appellant relied principally on the affidavit of one Jonathan Selvasegaram (JS), the appellant's corporate attorney. JS clearly did not depose to his personal knowledge of the

circumstances of the alleged infringement but relied instead on some dubious reports which were unsigned or unattributed to any particular person. In the circumstances, the affidavit of JS fell far short of establishing, which the appellant must, that the respondent had infringed the appellant's copyright. (See *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228). Although the respondent had admitted to selling a computer to Nur Ezza Saad it is elementary that it was not for the respondent to disprove the alleged infringement of copyright.

[3] It stood to reason that since the infringement of copyright attributed to the respondent remained unestablished, there was nothing for the respondent to rebut. The appellant's contention that the respondent's failure to produce rebuttal evidence was somehow of assistance to the appellant's case was clearly misconceived. In the circumstances the majority decision was there was no merit in the appeal which was accordingly dismissed with costs.

Hishamudin Mohd Yunus JCA:

[4] This is an appeal against the decision of the High Court of Kuala Lumpur (Commercial Division) given on 16 February 2009.

[5] The learned High Court judge, in his decision, had dismissed the appellant's/plaintiff's action against the respondent/defendant for infringement of copyright.

[6] I am allowing the appeal with costs.

[7] The appellant/plaintiff in this appeal is Microsoft Corporation (Microsoft), a globally recognized and renowned company involved in designing, producing, marketing and supporting a wide range of computer related products. Microsoft is also the copyright owner of a wide range of computer related products, including, amongst others, computer programmes.

[8] The respondent/defendant is a company incorporated in Malaysia dealing with computers and computer accessories.

[9] Microsoft commenced this action against the respondent/defendant for infringing Microsoft's copyright by reproducing and marketing pirated copies of Microsoft's computer programmes without Microsoft's consent, licence or permission.

[10] Before the High Court the appellant/plaintiff sought an injunction to restrain the respondent/defendant from infringing its copyright; and other incidental reliefs. The appellant/plaintiff also claimed for general damages (to be assessed).

[11] But the High Court had dismissed the appellant's/plaintiff's action.

[12] Hence, there is this appeal before this court (Court of Appeal).

[13] The writ and statement of claim were filed on 7 April 2008.

[14] The statement of defence was filed on 6 June 2008. The respondent/defendant denies the appellant's/plaintiff's allegation.

[15] Appellant's/plaintiff's reply was filed on 7 July 2008.

[16] When the case came up for case management before the High Court judge on 9 September 2008, the learned judge directed that the case be, heard by way of affidavit evidence. Accordingly, the parties were directed to file and serve their respective affidavits.

[17] This mode of proceeding is extremely unusual. This is a writ action. There should have been a normal trial held where witnesses are called to give oral evidence; and are cross-examined and re-examined. Particularly, where there are, as in this case, disputes as to facts. There is nothing on record to show that this mode of proceeding as directed by the learned judge (that is, by way of affidavit evidence only) was on the application of a party to the action. Even on the affidavit evidence, there is no cross-examination of deponents, although, as I have said earlier, there are disputes as to facts. The whole procedure is, with respect, rather irregular.

[18] Be that as it may, the appellant/plaintiff is not raising an issue on the mode of 'trial' (but, strictly, there was no trial).

[19] In compliance with the direction of the learned High Court judge, the appellant/plaintiff filed and served five affidavits, namely,:

(a) the affidavit of one Jonathan a/l Selvasegaram ('Jonathan'), Microsoft's Corporate Attorney, affirmed on 22 September 2008 (Jonathan's first affidavit);

(b) the affidavit of one Nur Ezza Saad (Nur Ezza'), a private investigator engaged by the appellant/plaintiff, affirmed on 22 September 2008 (Nur Ezza's affidavit'); A

(c) the affidavit of one Izanee bin Ariffin ('lzanee Ariffin'), a computer technician engaged by the appellant/plaintiff, affirmed on 22 September 2008 ('lzanee Ariffin's affidavit'); B

(d) the second affidavit of Jonathan affirmed on 23 October 2008; and

(e) the third affidavit of Jonathan affirmed on 15 December 2008. C

[20] The respondent/defendant, on their part, filed and served two affidavits, namely,:

(a) the affidavit of one Te Peng Keat, a director of the defendant company (ACT Integrated System Sdn Bhd), affirmed on 3 October 2008; and D

(b) the second affidavit of Te Peng Keat affirmed on 2 December 2008.

E

[21] In my judgment, it is obvious from the learned judge's grounds of judgment that the learned judge, with respect, after having directed parties to file affidavits, based his judgment solely on the affidavits of one witness only, namely, the affidavits of Jonathan; and had ignored the affidavit evidence of the appellant's/ plaintiff's other witnesses, that is to say, the affidavits of Nur Ezza and Izanee Ariffin. F

[22] Jonathan's affidavit evidence was adduced primarily to establish Microsoft's copyright ownership in Microsoft Windows XP Professional and Microsoft Office Professional Edition 2003. G

[23] That the learned judge merely confined his inquiry to the affidavits of Jonathan is obvious when he averred at para. 6 of his grounds of judgment:

H

> 6. The Plaintiff's case rests on the affidavit evidence of one Jonathan a/l Selvasegaram (a Malaysia citizen working in Singapore). The entire allegations made by the deponent pertaining to the alleged infringement by the Defendant rests solely on an unknown investigation report found in the Plaintiff's affidavit. I

[24] If we were to examine the appellant's/plaintiff's case, we will appreciate that the appellant/plaintiff also places much reliance on the affidavit evidence of Nur Ezza and Izanee Ariffin in order to establish its case that there was an act of infringement of its copyright committed by the respondent/defendant.

[25] If we were to examine the affidavit of the private investigator, Nur Ezza, we will note that she has averred to the following pertinent facts:

(a) that she went to the respondent's/defendant's outlet/premises on 9 September 2006;

(b) that the respondent's/defendant's employee by the name of Eddie Tan attended to her;

(c) that after she agreed to the quoted price of RM1,100 for a computer;

(d) that Eddie Tan on his own accord told her that he would hard-disk load Microsoft's software into the computer; and that Eddie Tan informed and assured her that the computer would be ready for use;

(e) that Eddie Tan tested out the computer by demonstrating the computer's functionalities;

(f) that during the test by Eddie Tan she saw Microsoft Windows XP (operating software) on the start-up screen and that she further saw Microsoft Office (application software) programmes;

(g) that she purchased the computer with the infringed copy of the Microsoft's software (the respondent's/defendant's invoice No. 27318, is exhibited as exh. JS-7 in the appellant's/plaintiff's affidavit (1).

(h) that Eddie Tan told her that the respondent's/defendant's customers would receive a warranty for Microsoft Windows XP only if they were to purchase original copies of the software; that Eddie Tan also told her that the copy installed in the computer purchase was a pirated copy and no warranty was given for the software; and

(i) that the respondent/defendant did not provide her with the relevant manuals and certificates of authenticity that would normally be packaged together with Microsoft's original software; and

(j) that she sent the computer that she had purchased to the law firm of M/s. Raja, Darryl & Loh. A

[26] The particulars of the respondent's/defendant's acts of infringement are recorded in her report that she submitted to the appellant/plaintiff (exhibited as exh. NES-1 in Nur Ezza's affidavit). B

[27] It is significant to note that Eddie Tan did not depose any affidavit to refute or to deny Nur Ezza's averments.

[28] And, if we were to examine the affidavit evidence of the computer technician, Izanee Ariffin, we will appreciate that he has averred to the following pertinent facts: C

(a) that he was commissioned by Microsoft (the appellant/plaintiff) to conduct an examination on the computer that was purchased by Nur Ezza from the respondent/defendant to ascertain as to whether or not there was any infringement of copyright; D

(b) that he conducted the examination on 22 September 2006;

(c) that his examination revealed that the computer purchased from the respondent/defendant was loaded with Microsoft Windows XP Professional and Microsoft Office Professional Edition 2003; E

(d) that he had verified that the software's installed were unlicensed; and F

(e) that he made a record of his examination in a report (marked as exh. JS-8 in Jonathan's first affidavit) which he submitted to the appellant/plaintiff. G

[29] In my judgment, the computer technician's (Izanee Ariffin) captured screen shots as shown in his report to substantiate Microsoft's claim of infringement of copyright against the respondent/defendant. If the computer did not contain any software or DOS as alleged by the respondent/defendant, the computer would not even turn on/boot-up. H

[30] Te Peng Keat in his affidavit evidence maintains that his shop only sells original copies of Microsoft's products such as Office 97 Professional Edition, Office 98 Second Edition, Office 2000 Premium Edition, Office 2000 Small Business Edition, Office XP Professional, Windows XP Professional, etc.; and he further I

avers that the computer that his shop sold to Nur Ezza on the day on question did not contain any hard disk or disk operating system (DOS). However, the difficulty of attaching any weight to his averments is that Eddie Tan, the very person alleged to have sold the computer to Nur Ezza did not affirm any affidavit at all in the proceeding.

[31] In my judgment, the learned High Court judge, with respect, erred when he made the finding that the private investigator, Nur Ezza, had purchased a computer without a DOS and hard disk from the respondent/defendant. With respect, the affidavit evidence by the respondent/defendant (the affidavit of Te Peng Keat) that the computer was sold to Nur Ezza without a hard disk is incredible. The explanation simply does not make sense. It is elementary that the very essence of a physical computer is the hard disk/hard drive ie, where computer data are stored. Nobody sells computers without a hard disk.

[32] In my judgment, if the learned High Court judge, with respect, were to have examined the appellant's/plaintiff's evidence in its entirety (and not just confined himself to the affidavits of Jonathan only), in all probability he would have made a finding in favour of the appellant/plaintiff.

[33] Therefore, I allowed the appeal with costs.

[34] I made an order as prayed for in the statement of claim, which includes an injunction against the respondent/defendant for the infringement of copyright on the terms as prayed, and for general damages to be assessed by the High Court (except that there is no order in respect of para. 17.4 which is withdrawn).